

Matter of: Shel-Ken Properties, Inc.; McSwain and Associates, Inc.

File: B-261443; B-261443.2

Date: September 18, 1995

Charlotte C. Jenkins, and Michael J. McSwain, for the protesters.

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DIGEST

1. Allegation that protester's proposal was misevaluated is denied where protester has presented only mere disagreement with the agency, and the record provides no basis to conclude that the evaluation was unreasonable.

2. Allegation that protester's proposal was misevaluated is denied where record shows that the alleged discrepancies in the evaluation process did not prejudice the protester.

DECISION

Shel-Ken Properties, Inc. and McSwain and Associates, Inc. protest the award of contracts to Intown Properties, Inc. and Prose, Inc., under request for proposals (RFP) No. 49-94-053, issued by the Department of Housing and Urban Development (HUD) for real estate asset management (REAM) services involving single-family properties owned by HUD in five geographic areas in the State of North Carolina. The protesters principally assert that their offers were misevaluated.

We deny the protests.

BACKGROUND

The RFP was issued on an unrestricted basis on December 15, 1994, contemplating a fixed-price contract for each of the five geographic areas in North Carolina (Areas I through V). Awards were to be made to the offerors whose proposals represented the best value to the government in terms of technical merit and, secondarily, price. Technical merit

was to be scored on a scale set forth in the RFP with a maximum of 120 points for 8 listed technical factors which related to experience and capability to perform the REAM services described in the statement of work. Offerors were to submit unit prices for managing individual single-family properties in each area for a base year with 4 option years.

These protests involve geographic Areas I, II and III. Neither protester submitted an offer covering Area IV, Shel-Ken did not compete for Area V, and McSwain received the award for Area V.

A total of 17 proposals were received for Area I. The initial evaluation resulted in technical scores ranging from 0 points to 120 points. The contracting officer established a competitive range which included 9 proposals with scores ranging from 84 points to 120 points. Shel-Ken's proposal, which received a score of 43 points, was excluded from the competitive range. McSwain's proposal received 116 points. The 9 technically acceptable proposals were subsequently determined to be equal in technical merit and award was made on the basis of low price to Intown which had offered an evaluated price of \$2,960 per property to be managed.

A total of 10 proposals were received for Area II. The initial evaluation resulted in technical scores ranging from 34 points to 120 points. A competitive range was established which included six offers with scores ranging from 90 points to 120 points. Shel-Ken's proposal received a score of 43 points as a result of which Shel-Ken's proposal was excluded from the competitive range. McSwain's proposal received a score of 112 points. The six proposals were subsequently determined to be equal in technical merit and award was made on the basis of low price to Prose which had offered an evaluated price of \$3,050 per property to be managed.

Twelve proposals were received for Area III. The initial evaluation resulted in technical scores ranging from 25 points to 120 points. A competitive range was established consisting of 7 offers with scores ranging from 77 points to 120 points. Again, Shel-Ken's proposal received a score of 43 points and was excluded from the competitive range. McSwain's proposal received 114 points. The 7 proposals were subsequently determined to be equal in technical merit and award was made on the basis of low price to Intown which had offered an evaluated price of \$3,010 per property to be managed.

Notice of the awards was issued on May 5, 1995, and these protests followed. On May 22, HUD made a determination to proceed with contract performance notwithstanding the pendency of the protests.

PRELIMINARY ISSUES

At the outset, we note that the protests contain a number of issues which are not for consideration on their merits.

First, Shel-Ken initially alleged that the awards were improper because the awardees' offers had expired. The agency addressed this allegation in its report and Shel-Ken did not respond in its comments on that report; the issue has, therefore, been abandoned by the protester, and is not for consideration by our Office. Analex Space Sys., Inc.; PAI Corp., B-259024; B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106.

Second, both protesters object to the basis of the agency's decision to override the statutory stay of contract performance imposed pursuant to 31 U.S.C. § 3553(c) (1988) when a protest is filed within 10 days of award. Our Office does not consider such challenges. See Harding Lawson Assocs.; ICF Technology, Inc.--Recon., B-239231.7; B-239231.8, Dec. 4, 1990, 90-2 CPD ¶ 450.

Third, both protesters allege that Intown and Prose submitted offers which were priced too low. The submission of a below-cost offer is legally unobjectionable and whether an offeror can perform at its proposed price concerns the offeror's responsibility. Reliable Trash Serv., Inc., B-258208, Dec. 20, 1994, 94-2 CPD ¶ 252. Here, the contracting officer determined that the awardees were responsible. Our Office will not disturb an affirmative determination of responsibility absent a showing of fraud or bad faith or failure to properly apply definitive responsibility criteria, id., circumstances which are not present here.

Fourth, both protesters allege that Intown's post-award subcontracting with former REAM contractors that participated in the competition indicates the existence of "collusive bidding." Since an allegation of collusion in competing on government procurements pertains to offeror responsibility in the first instance and is also a matter with possible criminal implications, allegations such as those raised by Shel-Ken and McSwain are not for resolution by this Office. Seyforth Roofing Co., Inc., B-241719.2, Mar. 11, 1991, 91-1 CPD ¶ 268. If the contracting officer suspects collusion, the matter should be referred to the Attorney General. U-Liners Contracting Co., Inc., B-245179.2, Oct. 24, 1991, 91-2 CPD ¶ 370.

Fifth, both protesters allege that the procurement should have been set aside for exclusive small business participation. Under our Bid Protest Regulations, protest issues based on alleged improprieties which are apparent

from the face of a solicitation must be filed prior to the time set for receipt of initial proposals. Since both protesters waited until after award to file their protests, these allegations are untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1995).

Finally, McSwain alleges that neither Intown nor Prose had a North Carolina real estate broker's license prior to award and concludes, therefore, that both awardees' proposals were technically unacceptable. However, the solicitation did not require possession of a broker's license. The only mention of such a license in the record is in minutes of a preproposal conference held on January 12, which were not incorporated into the RFP. Where, as here, a solicitation does not specifically require an offeror to possess a state license before award, a contracting officer is not charged with considering whether the offeror has such a license in awarding a contract. Honolulu Marine, Inc., B-248380, Aug. 6, 1992, 92-2 CPD ¶ 87. Rather, the licensing issue is a part of the general determination of an offeror's responsibility which, as stated above, we will not review absent circumstances not present in McSwain's protest. Reliable Trash Serv., Inc., supra.

EVALUATION ISSUES

Each protester challenges the evaluation of its own proposal. In reviewing such challenges, it is not the function of this Office to independently evaluate proposals--that is the primary responsibility of the contracting agency; rather, it is our function to review the evaluation to ensure that it was reasonably based and consistent with the stated evaluation criteria. JJH, Inc., B-247535.2, Sept. 17, 1992, 92-2 CPD ¶ 185. A protester's mere disagreement with the agency's evaluation of proposals does not establish that the evaluation was unreasonable. D.O.N. Protective Servs., Inc., B-249066, Oct. 23, 1992, 92-2 CPD ¶ 277. Even if discrepancies occur in the evaluation process, we will not sustain a protest where the record establishes that the protester was not prejudiced by the discrepancies. IT Corp., B-258636 et al., Feb. 10, 1995, 95-1 CPD ¶ 78.

SHEL-KEN'S PROTEST

As indicated above, Shel-Ken's proposal received a total of 43 points on the 120-point scale for 8 factors used to evaluate the technical proposals. This extremely low score led to the exclusion of the proposal from the competitive range. The awardee for Areas I and III, Intown, received 120 points for its proposal and submitted the low offers in each area of \$2,960 and \$3,010, respectively, per property to be managed. The awardee for Area II, Prose, received

95 points for its technical proposal and submitted the low offer of \$3,050 per property to be managed. Shel-Ken's price for each area was \$4,990 per property to be managed.

With the exception of its scoring under evaluation factors 6 and 7, involving the protester's understanding of HUD objectives and the tasks to be performed under the REAM contract, under which Shel-Ken's proposal was highly rated, the protester disputes the scoring of its proposal. For the reasons set forth below in analyzing representative allegations under the factors in dispute, we find no basis for disturbing the agency's evaluation of Shel-Ken's proposal.

Factor 1

Under Factor 1, which was worth a maximum of 15 points, Shel-Ken's proposal received a consensus rating of 4 points. Factor 1 involved:

"Demonstrated successful experience in the management of single family properties similar to and in the general area as those covered by this solicitation."

Section L of the RFP required that, for each factor calling for demonstrated successful experience, the offeror provide a detailed narrative concerning present experience or experience completed within the last 2 years.

The evaluators found that the firm had not provided a narrative demonstrating successful experience in managing single-family properties since 1992; they also found that Shel-Ken's dated experience was for properties in the Washington, DC metropolitan area--an area which they found to be dissimilar to the areas covered by the RFP.

Shel-Ken disputes these findings by pointing out that in its list of present clients, there are two that represent single-family townhouse projects. Shel-Ken further questions the geographic restriction inherent in the evaluation factor.

In the narrative provided by Shel-Ken for this factor, the protester focused exclusively on contracts with HUD which had been completed more than 2 years prior to the submission of its offer. The customer list, which is found in a collection of unindexed documents in its proposal and which is not cross-referenced in the narrative portion of the proposal, identifies present experience managing townhouses; however, it does not indicate whether these properties were considered "single-family"--a term the protester specifically uses elsewhere in describing other contracts it

had performed. Moreover, the list does not purport to be a narrative. Accordingly, the evaluators had a reasonable basis for downgrading the proposal on the basis that it did not adequately describe recent experience in this area.

Since the geographic restriction inherent in the evaluation factor was apparent from the face of the solicitation and the issue was not raised prior to the time set for receipt of initial proposals, it is dismissed as untimely. 4 C.F.R. § 21.2(a)(1).

Factor 2

Under Factor 2, worth a maximum of 10 points, Shel-Ken's proposal received a consensus rating of 4 points. Factor 2 involved:

"Demonstrated successful experience in developing listings of needed repairs, such as required by HUD's MPS, and estimating the costs of repairs."

Again, the evaluators downgraded Shel-Ken's proposal because the experience described was dated and did not demonstrate recent successful experience in estimating the cost of repairs.

Shel-Ken disputes these findings and specifically points out that its proposal included a listing of needed repairs for a fire-damaged property it managed in Maryland.

As with the first factor, Shel-Ken's narrative for this factor referred exclusively to dated experience with HUD. The listing to which the protester refers is not dated, although it is juxtaposed to other, unexplained, miscellaneous documents dated 1989. Moreover, beyond a blanket statement that Shel-Ken's president had extensive experience with estimating repair costs, no such estimates are included in the proposal; in contrast, the proposals of the awardees' illustrate cost estimating techniques with which they have had experience. Under the circumstances, we see no reason to object to the evaluation under this factor, which apparently gave the protester credit for its undated repair listing (almost one-half of the maximum points), but reasonably gave no credit for demonstrating successful experience in estimating the cost of repairs--the second part of the factor set forth in the RFP.

Factor 3

Under Factor 3, worth a maximum of 15 points, Shel-Ken's proposal received a consensus rating of 2 points. Factor 3 involved:

"Demonstrated successful experience in soliciting repair bids, coordinating and overseeing repair work and inspecting for satisfactory work completion."

As with the first two factors, the evaluators downgraded Shel-Ken's proposal because the listed experience was outside of the 2-year limitation set forth in the RFP. While Shel-Ken disputes the evaluation under this factor, our review again discloses that it was reasonably based because the only narrative description in the proposal which arguably addresses this factor is based on work with HUD which ended in 1992; moreover, our review discloses no narrative regarding overseeing repair work or the inspection of repairs.

Factors 4 and 5

The findings of the evaluators are the same for each factor and the factors themselves are interrelated, so we will analyze the two together.

Under Factor 4, worth a maximum of 20 points, Shel-Ken's proposal received a consensus rating of 7 points. Factor 4 involved:

"Evidence of adequately staffed, trained, and equipped office (or the ability to establish such) reasonably located so as to provide convenient service to HUD and its clients in the area to be served, and to carry out all duties specified in the solicitation. Resumes and job descriptions should be included."

Under Factor 5, worth a maximum of 15 points, Shel-Ken's proposal received a consensus rating of 2 points. Factor 5 involved:

"Maintaining facilities which provide reasonably convenient service to HUD and its clients in the area to be served and that such facilities are adequately staffed and furnished to provide daily meaningful service 9 AM to 5 PM, Monday through Friday of each week, with the exception of authorized Federal holidays."

Although noting that Shel-Ken had submitted a list of office equipment, the evaluators downgraded the protester for failing to identify where and when it would establish a North Carolina office. In addition, they questioned the adequacy of the proposed staff in terms of training and noted that 2 of the 3 key personnel listed in Shel-Ken's proposal had been working in unrelated fields.

Shel-Ken asserts that it would be impossible to know where an office would be established until after contract award and question how the awardees' proposals could have provided such information without those firms improperly knowing in advance that an award would be "steered" to them. Shel-Ken points out that, although the key personnel questioned by the evaluators are now in different fields, they previously worked on HUD contracts for the firm.

Shel-Ken's proposal merely states that it will establish an office in North Carolina at an unspecified location if awarded a contract. In contrast, the awardees' proposals listed specific locations in each area for which they competed where they planned to establish offices upon award. Moreover, they provided timeframes for the establishment of such offices. The difference between the two approaches is that with the awardees' approach, the agency could gauge whether a location was convenient or not in a given area--a requirement under both factors but, with Shel-Ken's blanket approach, no such assessment could be made. Thus, the agency had a reasonable basis for distinguishing between the proposals as it did. We find no merit to the protester's assertion that an offeror's indication of a specific office location in a given area implies that the offeror had been assured a contract in an improper manner.

With regard to Shel-Ken's two key personnel, the agency is correct in noting that they are now in different fields--fork lift operator and clerk in a child's clothing store--from their previously listed real estate management experience. While Shel-Ken may disagree about the significance of this fact to the successful performance of a REAM contract, the agency's position is not unreasonable given the unrelated occupations they are presently pursuing. Further, while Shel-Ken's proposal does make a blanket statement that the president has trained the staff, there are no details concerning the training. Under the circumstances, we see no basis to question the evaluation in this regard.

Factor 8

Under Factor 8, worth a total of 15 points, Shel-Ken's proposal received a consensus rating of 2 points. Factor 8 involved:

"Demonstrated successful experience in managing a rental program, including establishing fair market rentals and collections from present and former tenants, for single family properties."

As with the first three factors, the evaluators principally downgraded Shel-Ken's proposal because the listed experience

was not obtained within the last 2 years. The required narrative, which did discuss some but not all of the rental management functions set forth in the factor, is based exclusively on HUD experience which was not completed within the 2-year period required by the RFP. Accordingly, we have no basis to question the evaluation under this factor.

In sum, the evaluation was reasonably based and consistent with the stated evaluation criteria.

MCSWAIN PROTEST

As indicated above, McSwain's proposal was included in the competitive range for each of the three geographic areas under dispute. In fact, McSwain's proposal was evaluated as equal in technical merit with the proposals of each of the competitive range awardees and thus awards were made on the basis of low price. McSwain received an award on this basis for Area V at a price of \$4,277 with a consensus rating of 119 points. The following is a comparison of McSwain's technical rating and price with the awardees' for each geographic area in dispute:

| Offeror | Area I Rating/Price | Area II Rating/Price | Area III Rating/Price |
|---------|------------------------|-------------------------|--------------------------|
| Intown | 120/\$2,960 | N/A | 120/\$3,010 |
| Prose | N/A | 95/\$3,050 | N/A |
| McSwain | 116/\$3,856 | 112/\$4,138 | 114/\$4,168 |

McSwain alleges that, since its proposal was identical for each geographic area, the varying consensus ratings it received from 112 points (Area II) to 119 points (Area V) are indicative of a flawed evaluation. The agency explains that the varying ratings may be the result of averaging errors but argues that, since the awards were made on the basis of price in a competition between technically equal offerors, McSwain was not prejudiced by any alleged flaws in the evaluation process. We agree.

Even if the proposal was entitled to a score of 119 points for all areas, McSwain's would not have been in line for award for any of the areas at issue. McSwain's price is more than 30 percent higher than the awardee's in each area. Since the agency evaluated all of the technically acceptable offers as equal in technical merit and made the awards on

the basis of low price, McSwain simply was not prejudiced by any minimal scoring errors and we, thus, have no basis to sustain its protest. IT Corp., supra.

The protests are denied.

/s/ Ronald Berger
for Robert P. Murphy
General Counsel